

*In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division*

In the matter of:)	
)	
TPI INTERNATIONAL)	Adversary Proceeding
AIRWAYS, INC.)	
(Chapter 11 Case <u>91-20162</u>))	Number <u>95-2035</u>
)	
<i>Debtor</i>)	
)	
)	
TPI INTERNATIONAL)	
AIRWAYS, INC.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
)	
DEPARTMENT OF))	
TRANSPORTATION, a Department)	
of the United States Government)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

Plaintiff, TPI International Airways, Inc., (hereinafter "Debtor") filed its Chapter 11 petition on February 21, 1991. On July 28, 1995, Debtor filed this adversary proceeding, No. 95-2035, seeking the release of a document under the Freedom of Information Act, 5 U.S.C. Section 552 (a)(4)(B) (hereinafter "FOIA"), from the Defendant,

the Department of Transportation (hereinafter "DOT"). DOT filed its Motion to Dismiss on September 5, 1995. A continued hearing was held on February 12, 1996, to consider the Motion to Dismiss and other motions filed in the case. Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Debtor filed its petition for bankruptcy on February 21, 1991. On July 22, 1991, Debtor filed adversary proceeding 91-2030 against the Federal Aviation Administration. In Count I, Debtor objected to the amount and allowability of the claim of the United States acting on behalf of the Federal Aviation Administration (hereinafter "FAA"), which sought the recovery of certain fines which were levied as the result of alleged violations of safety regulations of the FAA applicable to certain airlines. Debtor claimed to have no knowledge of the investigative reports which caused the fines to be assessed and which were being withheld by the FAA.¹ Count II of the complaint sought damages for allegedly tortious

¹ In paragraphs six and seven of the complaint, Debtor alleges the following:

6. Defendant's claim exhibits one through three attached to defendant's proof of claim appear to be assessing fines against the Debtor as a result of investigative reports some of which Debtor has no knowledge and which according to the Federal Aviation Administration office in Oklahoma City, the central clearing house for all

activity of the government in demanding surrender of and/or revocation of the Debtor's certificates to operate an airline.

On August 29, 1991, the United States of America filed a motion to dismiss both Counts of adversary proceeding 91-2030. In support of its motion, the United States asserted that as to Count I Debtor failed to state a claim and as to Count II the court should dismiss for lack of subject matter jurisdiction. On June 24, 1992, this Court ruled in favor of the United States as to Count II and denied its motion to dismiss as to Count I.² Debtor

investigative reports,
did not exist as of
January 9, 1991.

7. Defendant's claim appears to be assessing fines as a result of investigative report 90s0110119, the specifics of which, though requested by the Debtor on numerous occasions, have never been provided. Defendant's proof of claim should be disallowed.

Plaintiff's Complaint Adv. Proc. No. 91-2030, p.2, ¶ 6-7.

² "I conclude that the FAA's decision to commence enforcement actions against TPI was a discretionary administrative decision; therefore the United States and its agency, the FAA, should not be liable in tort for withholding TPI's operating specifications or for any alleged misrepresentations regarding TPI's violations of FAA rules and regulations. Therefore, Count Two of Debtor's adversary should be dismissed. However, Debtor is entitled to object to the FAA's proof of claim and to be provided with documentation supporting the claim for penalties. The FAA has asserted that it is continuing to compile its investigative reports and that an amended proof of claim may be filed. Therefore, dismissing Count One of Debtor's complaint would be premature. Count One of Debtor's adversary will be subject to further hearings to finalize the amount owed to the FAA." Matter of TPI

subsequently appealed the adverse decision as to Count II and on December 21, 1992, the District Court for the Southern District of Georgia affirmed this Court's ruling. *See Matter of TPI International Airways, Inc.*, Case No. CV292-230, slip op. at 24 (S.D.Ga. Dec. 21, 1992)(Alaimo, J.). Debtor appealed the decision of the District Court to the Eleventh Circuit Court of Appeals; on appeal, however, the Eleventh Circuit Court of Appeals dismissed finding that the appeal was premature, there not having been any certification made under Fed. R. Civ. P. 54(b) that the matter should be the subject of immediate review notwithstanding the fact that fewer than all claims had been adjudicated. That Order was entered on July 14, 1993, and no certification of necessity for an immediate appeal has been sought by either party since that date. On January 7, 1994, the United States filed a motion to stay the proceedings as to Count I until the resolution of the appeal of Count II. On April 12, 1994, this Court, citing judicial economy, granted the motion of the United States to stay the proceedings under Count I until the final resolution of any damage claim against the United States in Count II. At the time of this writing, approximately two years after the granting of the indefinite stay, Debtor has yet to request a certification of the district court's decision as to Count II.

In the present adversary proceeding, No. 95-2035, Debtor has filed a petition for relief under the Freedom of Information Act, 5 U.S.C. Section 552 (a)(4)(B). Specifically, Debtor demands the release of the "Dutch Document", a written memorandum authored on June 3, 1993, by Dennis E. Dutch, a Director with the Office of Special Investigations for the Department of Transportation, reviewing the Report of Investigation ("ROI") into allegations that FAA officials improperly threatened to take certificate action against TPI. Debtor

International Airways, Inc., Adv. Pro. No. 91-2030, Ch. 11 Case No. 91-20162, slip. op. at 18 (Bankr.S.D.Ga. June 24, 1992) (Davis, J.).

requested a copy of this document from the Department of Transportation on September 27, 1994. That request was denied on February 8, 1995, by Roger P. Williams, Senior Counsel to the Inspector General.³ An appeal of the decision was also denied on March 13, 1995, by Mario A. Lauro, Jr., Deputy Inspector General, U.S. Department of Transportation.⁴

Debtor now asserts that because it has exhausted its administrative appeals judicial review is appropriate. In regard to this Court's subject matter jurisdiction, Debtor contends that the Dutch Document is material to the orderly administration of the estate and to its defense claims brought against the estate by the United States.⁵ Debtor claims that

³ "We can not process your request The [Dutch Document] represents the predecisional opinions and recommendations of agency staff and is, therefore, exempt from public disclosure by 5 U.S.C. Section 552(b)(5) and 49 C.F.R. Section 7.71." (Exhibit P-1).

⁴ "In the matter of the memorandum authored by Mr. Dutch, Mr. Catchpole's FOIA request was denied based on exemption 5, which allows an agency to withhold inter-agency documents that are part of the deliberative process (citation omitted). I found the memorandum conveys Mr. Dutch's analysis, opinions, and recommendations regarding his evaluation of certain investigative management issues to senior OIG decision makers. As such, Mr. Dutch's memorandum is clearly a predecisional internal agency document. Release of this document could chill the free exchange of opinions that might differ from opinions of decision makers. Furthermore, any factual material that may be contained in Mr. Dutch's memorandum is so intertwined with the opinions that it cannot be segregated, hence no partial disclosure can be made. Therefore, I find that the Senior Counsel's denial of the request for Mr. Dutch's memorandum in accordance with 5 U.S.C. Section 552(b)(5) was proper." (Exhibit P-3).

⁵ "Plaintiff believes in good faith and contends the Dutch Document is material to the orderly administration of the Estate and to its defense of claims brought against the Estate by the U.S. Government." Plaintiff's Complaint Adv. Proc. No. 95-2035, p. 3, ¶ 13.

although it had an opportunity to verify the contents of the Document during a direct examination of Dennis Dutch in another proceeding, Mr. Dutch's lack of memory during his testimony prevented a satisfactory verification. Moreover, Debtor contends that the Document was not predecisional and deliberative as required by 5 U.S.C. Section 552(b)(5). Finally, Debtor requests a copy of the Document and other appropriate relief as this Court determines appropriate.⁶

⁶ "Wherefore, TPI International Airways, Inc. prays as follows:

A. That the Defendant be restrained and enjoined from withholding the June 3, 1993, Dutch Document concerning TPI International Airways, Inc.;

B. In the alternative that the Defendant be required to produce the June 3, 1993, Dutch Document for an in camera review by this Court to determine whether such document or any part thereof shall be withheld under 5 U.S.C. Section 552 (b) (5);

C. That the Defendant be required to pay Plaintiff's attorney fees incurred in bringing this Adversary pursuant to 5 U.S.C. Section 552 (a) (4) (E);

D. That the Defendant be required to pay Plaintiff's costs incurred in bringing this action pursuant to 5 U.S.C. Section 552 (a) (4) (E);

E. That this Court grant an expedited hearing pursuant to 5 U.S.C. Section 552 (a) (4) (D);

F. For such other and further relief as this Court deems necessary and proper."

Plaintiff's Complaint Adv. Proc. No. 95-2035, p. 5-6, ¶20.

In response, the United States has filed a motion to dismiss or in the alternative to withdraw the reference. The government contends that 5 U.S.C. Section 552(a)(4)(B) grants exclusive jurisdiction over FOIA case in the District Courts.⁷ In the alternative, the government asserts that the FOIA is neither a "core proceeding" of nor "related to" the underlying bankruptcy of Debtor. Therefore, the government urges this Court to grant its motion and dismiss the proceeding for lack of subject matter jurisdiction.⁸

CONCLUSIONS OF LAW _____

Upon consideration of the applicable authorities, I agree with the United States that this proceeding should be dismissed for lack of subject matter jurisdiction. First, it should be pointed out that the United States also sought withdrawal of the reference of this matter to the United States District Court. The statute governing withdrawal of the automatic reference of cases to the Bankruptcy Court is found at 28 U.S.C. Section 157(d) which provides as follows:

⁷ "On Complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

⁸ The United States also request this Court to abstain from adjudicating this matter even if "related to" jurisdiction exists " . . . because (1) the plain jurisdictional language of the FOIA, (2) the total absence of precedent from any federal court holding or even indicating in any way that bankruptcy courts can resolve substantive FOIA issues, (citation omitted) (3) the Department's intent to appeal an adverse ruling to the district court, and (4) the requirement that the district court consider this matter *de novo* 28 U.S.C. §157(c)(1)." Reply of the U.S. Dept. of Trans. to TPI's Response to DOT's Motion to Dismiss, p. 4-5.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

By its terms, the decision to withdraw the reference of any matter which has otherwise been automatically referred for resolution in this Court is a decision vested solely with the District Court. Accordingly, I find that I have no authority to consider such a motion and the motion must therefore be, and the same is, hereby denied.

With respect to the Motion to Dismiss, however, I find that motion to be well-founded. Bankruptcy jurisdiction is established by 28 U.S.C. Section 1334 which provides in relevant part as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. §1334(a) and (b). Pursuant to the authority found in that Code section, bankruptcy judges in this district are authorized by 28 U.S. Section 157(b) to

... [H]ear and determine all cases under title 11 and all core

proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. §157(b)(1).

The first category, "all cases under title 11," refers to the original bankruptcy petition itself.⁹ The second category, "proceedings arising under title 11," refers to matters which rely upon a cause of action either created or determined by a provision of title 11, such as a trustee's action to avoid a preference.¹⁰ The third category, "proceedings arising in cases under title 11," covers those administrative matters which, although not based on any right expressly created by title 11, nonetheless would not exist outside of bankruptcy.¹¹ Such matters would include the filing of a proof of claim or an objection to discharge.¹²

The final category of jurisdiction, those proceedings that are "related to" a case under title 11, is by far the broadest in scope and the most difficult in practice to apply. "The test to determine if a proceeding is 'related to' a case under title 11 is if the outcome of the proceeding could conceivably have an effect on the administration of the bankruptcy

⁹ See In re James Edward Cady, Jr. (Rentrak Corp. v. James Edward Cady, Jr., v. Willie Eugene Sapp, et.al.), Adv. Pro. No. 93-05024, Ch. 7 No. 93-50258, slip op. at 5 (Bankr. S.D.Ga., March 11, 1994) (Walker, B.J.) (*citing* Matter of Wood, 825 F.2d 90, 92 (5th Cir. 1987)).

¹⁰ Matter of Wood, 825 F.2d at 96-97.

¹¹ Id. at 97.

¹² James Edward Cady, Jr., *supra*, at 6.

estate."¹³ "The proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate."¹⁴ This category of jurisdiction is not without limits, however. "Although the optimist may argue that anything is 'conceivable,' any practical definition of this term of art must be tempered by a measure of reasonableness."¹⁵

In consideration of the scope of this provision I conclude that the only conceivable category under which a Freedom of Information Act request can be entertained by this Court is if it is determined to be "related to" a case under title 11. The Debtor argues this is properly considered a related matter for the reason that if the Debtor recovers the unredacted copy of the memorandum which is the subject of this action, it may constitute evidence, or lead to the discovery of evidence, that would support the Debtor's contentions that its authorization to operate an airline was tortuously taken from it by agents of the United States government. Specifically, Debtor contends that this FOIA request is "related to" the administration of the estate because by recovering the document and proving the tortious actions of the United States, it would then be in a position to either (1) bring assets into the estate through future litigation, (2) justify a reversal of this Court's Order granting summary judgment in Count II of adversary proceeding 91-0203, or (3) defend against the FAA's claim

¹³ In re James Edward Cady, Jr., *supra*, slip op. at 6 (*citing* In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990)).

¹⁴ In re Lemco Gypsum, Inc., 910 F.2d at 788.

¹⁵ In re Chargit, Inc., 81 B.R. 243, 247-48 (Bankr. S.D.N.Y. 1987).

in Count I of adversary proceeding 91-0203 that arises from assessed fines due to TPI's allegedly improper maintenance of its airplanes.

Debtor's interpretation of the scope of "related to" jurisdiction is simply incorrect. First, the Dutch document might or might not be a tool which could be utilized in other litigation, but in and of itself it would have no "effect on the administration of the bankruptcy estate." A mere assertion that the Dutch document might eventually aid the realization of future revenue for the estate does not provide the necessary nexus to invoke "related to" jurisdiction. Notwithstanding the equally possible detrimental affect that this litigation might have on the assets of the estate, the Debtor has not met its burden of showing beyond a remote possibility that the document itself would either enhance or deplete the estate or that it would substantively alter the Debtor's rights, liabilities, options, or freedom of action within the meaning of the decisions which have construed this section. See In re Lemco Gypsum, Inc., 910 F.2d at 788.

Second, in regard to whether the document might possibly aid in proving Debtor's contentions in Count II of adversary proceeding 91-2030, by a decision entered on June 24, 1992, I ruled that Count II of that adversary proceeding should be dismissed and on appeal to the District Court that ruling was affirmed.¹⁶ Thereafter, the Eleventh Circuit remanded the case finding that there had been no certificate of finality and for nearly three years since that decision by the Eleventh Circuit the Debtor has neglected, failed, or refused to take any action to obtain the necessary certificate in order to obtain a final review of this

¹⁶ Count II of that action asserted the Debtor's claim for damages based on alleged torts of the United States and its employees or agents.

Court's judgment. I find the proposition that the recovery of this document is in any way related to the Debtor's Chapter 11 case to be specious. This Court's judgment dismissing Count II of the adversary (the tort action against the United States) is, until reversed or set aside, the law of the case. *SEE Class v. Norton*, 507 F.2d 1058, 1060 (2nd Cir.1974) (one is bound to obey an order issued by a court with jurisdiction over the person and subject matter unless and until that order is reversed by appropriate judicial proceedings); *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed. 2d 1210 (1967). In short, the litigation on which Debtor relies to claim relatedness has been dismissed by this Court and that decision has been affirmed by the United States District Court for this District and, therefore, I will not consider it as a factor in assessing the question of relatedness.

Finally, Debtor asserts that the document is "related to" because it might assist Debtor in its Count I defense to the FAA's assertion of a claim for civil penalties in adversary proceeding 91-2030. However, Debtor has not carried its burden of demonstrating that this document could conceivably have an effect on the estate being administered in bankruptcy. Debtor's contention is fallacious in light of the unredacted text of the memo which clearly is limited to an investigation of the Debtor's allegations that FAA had acted tortiously in obtaining Debtor's certificates to operate. The redacted document provides enough information to understand that Dennis Dutch limited his memorandum to a review of the allegedly tortious conduct committed against TPI without assessing the merits of the FAA fines and penalties. I find that subject matter jurisdiction is not conferred in light of the fact that the memo does not address itself to Count I issues, and the subject it does address, tortious acts, is no longer before this Court.

Accordingly, I rule that this action is not "related to" a case under title 11 and this Court has no subject matter jurisdiction to entertain it.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion of the United States is granted and this case is dismissed.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of February, 1996.